89-1685

No. _____

In The

Supreme Court of the United States

October Term 1989

STATE OF MICHIGAN,

Petitioner,

vs.

ROBERT ALAN GRZEGORCZYK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

ROBERT E. WEISS P-22148
Prosecuting Attorney
Genesee County, Michigan
100 Court House
Flint, Michigan 48502
Phone (313) 257-3248

DONALD A. KUEBLER P-16282
Chief, Appellate Division
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Where a state trial court imposes an unlawful sentence and the defendant appeals his conviction and sentence and during the pendency of the appeal the defendant is unlawfully paroled and the State Court of Appeals vacates the unlawful sentence and remands for resentencing as required by statute and the defendant thereafter seeks rehearing in the Court of Appeals and upon denial seeks leave to appeal in the State Supreme Court and prior to the decision on said application defendant is unlawfully discharged from parole, does a sentence subsequently imposed by the trial court violate defendant's constitutional right to due process of law or violate defendant's constitutional protection against double jeopardy where the defendant under the facts of this case had no expectation of finality with respect to sentencing.

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No. _____

In The

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Now comes the state of Michigan, Petitioner, by Robert E. Weiss, Prosecuting Attorney in and for the county of Genesee, by Donald A. Kuebler, chief appellate counsel, and prays that a writ of certiorari will issue to review the judgment of the Michigan Court of Appeals, filed on July 5, 1989, leave to appeal denied by the Michigan Supreme Court on November 24, 1989, and request for rehearing denied on January 29, 1990, which vacated the respondent's sentence of life probation for the crime of delivery of more than 50 grams but less than 225 grams of cocaine contrary to the Public Health Code of Michigan, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Court of Appeals was filed on July 5, 1989, and is reported at 178 Mich App 1, 443 NW2d 810 (1989). That opinion vacated the respondent's resentence of life probation entered by the Genesee County Circuit Court following a remand for resentencing ordered by another panel of the Court of Appeals in an unpublished per curiam opinion entered on March 25, 1986. *People v Grzegorczyk*, CA # 71995. (Appendix 6a-11a) Following the Court of Appeals vacatur of respondent's lawful life probation sentence, the petitioner sought leave to appeal in the Michigan Supreme Court. On November 22, 1989, leave to appeal was denied. *People v Grzegorczyk*, SC # 86708. Petitioner timely sought rehearing and on January 29, 1990, rehearing was denied. Copies of the opinions of the courts below and the referenced orders are included in the appendix to this petition, *infra*. (Appendix 4a-36a)

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The constitutional provisions which the above-entitled Petition involves are as follows:

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

Respondent Robert Alan Grzegorczyk was convicted in 1983 in the Genesee County, Michigan, Circuit Court, McAra, J., of delivery of more than 50 grams but less than 225 grams of cocaine, contrary to MCL 333.7401(2)(a)(iii).

On May 25, 1983, contrary to the penalty provision of the above-cited statute, McAra, J., imposed an invalid sentence of 5 years to 20 years imprisonment. Under the

statute, the only lawful sentence for a defendant convicted of this crime was a term of imprisonment of 10 years to 20 years, or for probation for defendant's lifetime. In its wisdom, the Michigan Legislature also limited the possibility of altering such defendant's eligibility for parole or suspension of sentence before expiration of the mandatory term. MCL 333.7401(3). (Appendix 10a, 11a, 30a, 31a)

The respondent filed a claim of appeal with the Michigan Court of Appeals and filed a motion for peremptory reversal. Petitioner responded to that motion and additionally filed an ancillary request for sentence vacatur for the reason that the trial court imposed an invalid sentence, thus giving notice to the respondent and Court of Appeals that respondent's sentence was invalid. (Appendix la, 2a) Following denial of the motion for peremptory reversal, respondent appealed his conviction and sentence and with respect to the sentence (even though illegal), claimed it was too harsh.

The Court of Appeals affirmed respondent's conviction on March 25, 1986 but remanded to the circuit court for resentencing because the sentence imposed violated the statute requiring that respondent either be placed on life probation or sentenced to a term of 10 years to 20 years in prison. *People v Grzegorczyk*, CA # 71995. (Appendix 10a, 11a)

Respondent requested rehearing in the Court of Appeals which was denied. Respondent thereafter filed for leave to appeal to the Michigan Supreme Court and while the case was pending he was given an early discharge from his unlawful parole. The Michigan Supreme Court

denied the respondent's application for appeal and for reconsideration "without prejudice to the defendant's raising the claims, among others, of double jeopardy and due process violations to a 'resentence' of the defendant after being discharged by the Department of Corrections." (Appendix 14a-17a) Respondent was resentenced on March 5, 1987 to a term of probation for life. Respondent appealed of right claiming that the circuit court was without jurisdiction to resentence him.

On July 5, 1989, the Michigan Court of Appeals in a 2-1 decision vacated the life probation sentence holding that respondent's constitutional protection against multiple punishments for the same offense was violated when the punishment already exacted was not credited in resentencing where the defendant is given a sentence of life probation. The Court further held that any resentencing of the defendant after his discharge from the first, albeit invalid, sentence resulted in a denial of due process of law. (Appendix 20a-30a)

REASONS FOR GRANTING THE WRIT

The case *sub judice* presents to this Honorable Court the opportunity to resolve the question of whether a state criminal defendant, having no reasonable expectation of finality in an invalid sentence, is entitled to discharge from a resentence of life probation allowed by statute, on the grounds that such resentencing violated defendant's protection against double jeopardy and was a denial of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

The Michigan Court of Appeals decision in this case, per Rashid, J., has decided federal questions and interpreted the Fifth and Fourteenth Amendments in a way that is in conflict with decisions of other courts, state and federal, and this Court.

The opinion of the Michigan Court of Appeals is not supported by any decision of the United States Supreme Court. Moreover, recently decided cases of this Court and other jurisdictions give substantial support to the contention of petitioner that the resentencing of the respondent under the facts of this case does not constitute a violation of his rights to due process of law or a violation of his protection against double jeopardy.

The decisions indicate that when a sentence is invalidated at the behest of the defendant, the slate is wiped clean, and on resentencing, any sentence which could have been imposed initially may be imposed. This proposition is qualified by the proviso that the resentence does not violate due process. *Herring v State*, 411 So 2d 966, 969 (Fla 1982); *United States v DiFrancesco*, 449 US 117, 101 S Ct 426, 66 L Ed 2d 328 (1980).

In *People v Gribble*, 172 Cal Rptr 362 (1981), the Court said:

> When the sentence imposed is in excess of the court's jurisdiction, the court has jurisdiction to impose a legally correct sentence at a later time. (citations) When an illegal sentence is vacated, the court may substitute a proper sentence even though it is more severe than the sentence imposed originally. (citations)

Other cases indicate that resentencing a defendant to correct an illegal sentence does not implicate double jeopardy rights and this is so even where the defendant has already served part of his term. *Stuckey v Stynchcombe*, 614 F2d 75 (5th Cir) at p 76, citing *Bozza v United States*, 330 US 160, 166-167, 67 S Ct 645, 648-649, 91 L Ed 818 (1947); *United States v Denson*, 603 F2d 1143 (5th Cir 1979) (*en banc*); *Llerena v United States*, 508 F2d 78, 80, 81 (5th Cir 1975); *Caille v United States*, 487 F2d 614, 615 (5th Cir 1973).

The jurisprudence also states that where a defendant challenges his sentence on appeal, the defendant by this action effectively appeals the entire sentence. See *Gauntlett v Kelley*, 658 F Supp 1483 (W.D. Mich 1987). In *Gauntlett*, the Court said:

> A defendant who has received an illegal sentence that is subject to correction, or who has been sentenced in an illegal manner that is subject to correction, cannot claim a legitimate expectation for finality. (citations)
>
> A defendant who has appealed his sentence, and thus has sought to "nullify the sentencing plan" generally cannot claim a legitimate expectation for finality.

In *United States v Busic*, 639 F2d 940 (3rd Cir 1981), the Court said:

> The Double Jeopardy Clause appears to have been drafted with common law jeopardy principles in mind. (citations) Nothing in the history or policy of the clause suggests that its purposes included protecting the finality of a sentence and thereby barring resentencing to correct a sentence entered illegally or erroneously. (639 F2d at p 948)

The Michigan Court of Appeals majority found that since the respondent was resentenced to life probation without credit for 3½ years served in prison, such sentence violated the constitutional protection against multiple punishments under *North Carolina v Pearce*, 395 US 711, 89 S Ct 2077, 23 L Ed 2d 656 (1969). (Appendix 25a, 26a) The dissent of Sawyer, J., however, correctly observed that "defendant's sentence was invalid because it fell outside the statutory limitation of the sentencing judge's discretion." (Appendix 30a)

A criminal defendant, such as respondent Grzegorczyk, is charged with knowledge that his sentence, if illegal, is subject to correction. See, e.g., *United States v Crawford*, 769 F2d 253, 257 (5th Cir 1985).

On June 21, 1983, respondent filed a motion for peremptory reversal with the Michigan Court of Appeals. Petitioner responded to that motion and additionally filed an ancillary request for sentence correction for the reason that the trial court imposed an illegal sentence, failing to sentence respondent to a term of 10 to 20 years imprisonment or life probation. (Appendix 1a, 2a) The Michigan Court of Appeals did not rule on the motion of petitioner for sentence correction (Appendix 4a) but did so in the subsequently entered opinion in *People v Grzegorczyk*, CA # 71995 (Mar. 26, 1986). (Appendix 10a, 11a) Respondent in this case had notice that his 5 to 20 years sentence was illegal.

In *Herring v State*, 411 So 2d 966, 970 (Fla 1982), citing *United States v DiFrancesco*, 449 US 117, 101 S Ct 426, 66 L Ed 2d 328 (1980), the Court noted with particularity that:

> "(T)he rejection of the notion that there is some vested right in the length of a sentence

> necessarily includes rejection of the notion that there is a vested right in any other part of a sentence. Once a sentence is imposed in a criminal case it is not accorded the constitutional finality and conclusiveness that attaches to a jury verdict of acquittal.

Several decisions hold that correction of a sentence imposed in an illegal manner does not violate double jeopardy even if the sentence as corrected increases the punishment and the fact that the defendant has commenced serving the sentence is irrelevant. See, e.g., *United States v Stevens*, 548 F2d 1360, 1362-63 (9th Cir 1977), *cert den* 430 US 975, 97 S Ct 1666, 52 L Ed 2d 369 (1977).

Moreover, a defendant can have no legitimate expectation of finality in an illegal sentence. *Jones v Thomas*, 491 US ___, 105 L Ed 2d 322, 109 S Ct ___ (1989).

The Michigan Court of Appeals majority decision in the case *sub judice* largely turns on its application of *Ex Parte Lange*, 18 Wall 163, 21 L Ed 872 (1874) as authority for the proposition to the effect that once the defendant "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." (Appendix 25a, 26a)

The Michigan Court's opinion ignores the fact that as a condition precedent to the application of *Lange*, the criminal defendant must have satisfied one of two alternative punishments that could *lawfully* be imposed. *Jones v Thomas*, 491 US ___, 105 L Ed 2d 322, 109 S Ct ___ (1989). In the case *sub judice* the initial sentence imposed by the trial court was not *lawful*, for as correctly stated by dissenting Judge Sawyer:

> . . . defendant's first sentence was invalid because it fell outside the statutory limitation on the sentencing judge's discretion. (Appendix 30a)

Not only was the sentence invalid but further, the sentence could not be "satisfied" in the lawful sense because pursuant to the pertinent statutory provision:

> . . . defendant was not eligible for parole and was not properly subjected to the jurisdiction of the parole board before serving the minimum sentence imposed. (Appendix 32a)

In this case, we have the imposition of an initial unlawful sentence followed by an unlawful parole during the pendency of the respondent's appellate pursuits, with the respondent being fully chargeable with knowledge of the aforesaid illegalities and the prosecutor requesting in the Court of Appeals that the sentence be vacated because of the illegality within approximately one month after the sentence was imposed.

In this case, it was the mere fortuitous event, occurring during this unnecessarily long appellate process, that the respondent was unlawfully discharged from the unlawful parole based on an unlawful sentence that caused the Michigan Court of Appeals to hold that respondent had satisfied his sentence and that to permit the resentence of life probation to stand would constitute double punishment. In *Jones, supra,* this Court said:

> . . . We have previously observed that "(t)he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." (105 L Ed 2d at p 335).

The Court of Appeals majority decision clearly ignores precedential authority holding that there cannot be a valid discharge from a parole where there is no valid sentence. See, e.g., *Tague v Hudspeth*, 171 Kan 225; 231 P2d 209 (1951); *Trusley v Eckle*, 149 NE2d 575 (Ohio App 1956). In *In Re Adams*, 169 Mich 606; 35 NW2d 658 (1912), it was held that the action of the parole board in granting parole in violation of a statute conferred no rights to defendant.

The Michigan Court of Appeals finding of a violation of *Pearce* because the respondent was not credited with 3½ years prison time against the life probation sentence is unwarranted in the context of this case. The Court of Appeals majority specifically found that the resentencing judge did not resentence respondent to life probation because respondent had appealed his original conviction and sentence. (Appendix 21a, 22a) Thus there was not a *Pearce* violation in this regard. The Court recognized that had the respondent been resentenced to imprisonment for 10 to 20 years, the matter of sentence credit required by *Pearce* could be satisfied, but determined that respondent's (erroneous) parole discharge precluded such a finding. In the *Jones* case, *supra*, the Court rejected a substantially similar theory because it could lead to anomalous results:

> . . . Under respondent's theory, for example, everything depends on the order in which the consecutive sentences were originally imposed. Had respondent been sentenced to the life sentence first, he would be serving the very same term, but could advance no double jeopardy argument. There is no indication that the order of the sentences was of the slightest importance to the sentencing judge, and there is no reason constitutional adjudication should turn on such *fortuities*. (105 L Ed 2d p 334) (Emphasis added)

Even if it can be said that under the circumstances of this case compliance with *Pearce* requires that sentence "credit" be given for time already served, the respondent is not altogether without a remedy. Unlike a sentence of imprisonment or fine, a sentence of life probation cannot be fully served until the death of the prisoner. A prisoner who violates the terms of probation may be subsequently sentenced by the trial court for the full term of imprisonment authorized by law. In the event such defendant were to violate the terms of his probation and be sent to prison for a term of years (in this case 10 years to 20 years), the 3½ years already served could be fully credited against the new sentence.

This "credit on reserve" approach, although admittedly imperfect, should be sufficient to satisfy any double jeopardy concerns under the unusual facts in this case.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Honorable Court will grant this petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals.

Respectfully submitted,

ROBERT E. WEISS P-22148
Genesee County Prosecuting Attorney

DONALD A. KUEBLER P-16282
Chief, Appellate Division
Counsel for Petitioner

Dated: April 25, 1990

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1989 TERM

NO.

STATE OF MICHIGAN,
Petitioner,

VS

ROBERT ALAN GRZEGORCZYK
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

ROBERT A. GRZEGORCZYK,
Defendant-Appellant.

Court of Appeals
No. 71995

Circuit Court
No. 82-31574-FY

APPEAL FROM THE GENESEE
COUNTY CIRCUIT COURT
7TH JUDICIAL CIRCUIT
THE HONORABLE HARRY B. MCARA, J.

PEOPLE'S ANCILLARY REQUEST FOR SENTENCE CORRECTION FOR NONCOMPLIANCE WITH THE MANDATORY SENTENCING PROVISIONS OF THE PUBLIC HEALTH CODE

Now comes plaintiff-appellee, and pursuant to the provisions of GCR 1963, 820.1(7), moves this Court to enter an order correcting the sentence in this cause. For reasons and grounds appellee states unto the Court as follows:

(1) That the defendant was bench-convicted of the delivery of more than 50 but less than 225 grams of cocaine contrary to MCLA 333.7401 (1) and (2)(a)(iii); MSA 14.15 (7401)(1) and (2)(a)(iii).

(2) That the mandatory punishment for said offense is as follows:

> (iii) Which is in an amount of 50 grams or more, but less than 225 grams . . . is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life. (Id.)

(3) That according to the records and files in this case the trial court committed error when it imposed a minimum sentence of 5 years imprisonment because the trial court was without discretion to impose such minimum sentence where the legislature has mandated that such a conviction requires that the defendant's minimum sentence be that of 10 years imprisonment.

(4) That under the provisions of GCR 1963, 820.1(7) this Court is authorized to enter any judgment or make any order which ought to have been given or made and it is submitted that under the facts of this case and the statutory provisions at issue herein this Court should correct the sentence in this matter to reflect imposition of the statutorily required minimum sentence of 10 years imprisonment.

Wherefore, appellee prays that this Honorable Court will enter an order correcting the sentence in this matter to that of 10 years to 20 years imprisonment.

DATED: June 30, 1983

Respectfully submitted,
/s/ Donald A. Kuebler
DONALD A. KUEBLER
P-16282
Chief, Appellate Division

/s/ Edwin R. Brown
EDWIN R. BROWN P-11274
Assistant Prosecuting
Attorney

ROBERT E. WEISS
Prosecuting Attorney
Genesee County
100 Court House
Flint, MI 48502
(313) 257-3248

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the twenty-second day of July in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable

JOHN H. GILLIS
Presiding Judge

VINCENT J. BRENNAN
ROMAN S. GRIBBS
Judges

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ROBERT A. GRZEGORCZYK,

Defendant-Appellant.

No. 71995
L.C. No. 82-31574-FY

In this cause a motion for peremptory reversal, motion for bond, and motion for immediate consideration are filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the motion for peremptory reversal be, and the same is hereby DENIED for failure to persuade the Court of the existence of manifestly reversible error warranting peremptory relief.

IT IS FURTHER ORDERED that the motion for bond be, and the same is hereby DENIED.

STATE OF MICHIGAN – ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 28th day of July in the year of our Lord one thousand nine hundred and eighty-three.

/s/ Ronald L. Dzierbicki
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ROBERT A. GRZEGORCZYK,

Defendant-Appellant.

_____/

No. 71995
(Filed Mar 25, 1986)

BEFORE: D.E. Holbrook, Jr., P.J., Allen, and Edward M. Thomas*, JJ.

PER CURIAM

The defendant, after a bench trial, was convicted of delivery of a mixture containing cocaine in an amount of 50 grams or more but less than 225 grams, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He received a prison sentence of 5 to 20 years, and appeals his conviction by right.

Michigan State Police Officer Gordon Good testified that while working in an undercover capacity, he arranged to make a drug purchase from a Fred Braman. At an earlier meeting, between only Officer Good and Braman, they agreed to the specifics of the transaction, including amount, price and place of transfer. Officer Good was instructed to meet at Braman's condominum at 8:30 p.m. on November 17, 1981. After being admitted to the premises, the officer observed a woman in the kitchen

*Recorder's Court judge, sitting on the Court of Appeals by assignment.

who was introduced as "Karen" and a man seated at the dining room table who was later identified as the defendant. The officer and Braman took a seat at the table with defendant, who had before him several items of narcotics paraphernalia, a silver bowl containing a white powdery substance, and several plastic baggies filled with a white powdery substance. Braman told Officer Good that the three baggies each contained two ounces of cocaine.

The officer selected a baggie and pretended to test it at which time the defendant, who had been silent, suggested that the officer try another baggie to see if he had chosen the one with the best quality. He later made a similar suggestion and after Braman was paid, the defendant participated in a conversation concerning the best method of cutting or diluting the cocaine. The defendant also took some cocaine from the silver bowl on the table and snorted it through a straw. The officer then left the residence, and the defendant was later arrested. At the conclusion of Officer Good's testimony, he stated that when he entered the premises, Braman introduced him to defendant as "Bob, his cocaine partner." Defendant's hearsay objection was overruled.

The defendant appeals as of right and raises three issues.

I. Did the trial court commit reversible error in admitting the statement made by Braman to Officer Good that defendant was his cocaine partner?

MRE 801 and 802 provide that out-of-court statements offered for the truth of the matter asserted are hearsay and are inadmissible. However, MRE 801(d)(2)(E) provides that a statement is not hearsay if it is made by a

co-conspirator of the defendant during the course of the conspiracy and in furtherance thereof. Before the statement can be admitted, the prosecutor must prove by prima facie independent evidence that a conspiracy or a concert of action existed prior to admitting the statement made by a co-conspirator against the defendant. *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). Circumstantial evidence may be used to establish that a concert of action existed so as to allow a co-conspirator's statements into evidence. *People v Stewart*, 397 Mich 1, 6; 242 NW2d 760 (1976). A co-conspirator's statements are admissible even in the absence of a conspiracy charge, if a concert of action is proven by independent evidence. *People v Woodfork*, 47 Mich App 631, 633; 209 NW2d 829 (1973). *lv den* 411 Mich 1041 (1981).

In the instant case, the prosecutor's theory was that the defendant aided and abetted in the delivery of cocaine from Braman to Good. Both parties agree that it was imperative to show a concert of action prior to admitting the statement made by Braman. The evidence which tends to show the defendant was involved with the delivery is his own statements and his own actions.

The defendant was seated at the table when the delivery of cocaine occurred. The defendant advised Good to test the other bags to determine which bag had the best quality of cocaine. The defendant explained how to cut the cocaine. Defendant then proceeded to snort some of the cocaine from the silver bowl which was on the dining room table. These facts appear to be sufficient to determine that the defendant and Braman were acting together in the delivery of cocaine to Good. After having determined that the defendant was aiding and abetting in

the delivery of the cocaine, it was clearly proper for Good to testify as to what Braman said during the cocaine transaction. The trial court did not commit error in admitting Braman's out-of-court statement.

II. Was there sufficient evidence to sustain the defendant's conviction of delivery of cocaine?

When reviewing a case to determine if there was sufficient evidence to convict a defendant, this Court looks at the evidence in light most favorable to the prosecutor and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). The elements of the crime of delivery of cocaine are the intent to deliver and the knowledge of the unlawful purpose. *People v Flores*, 89 Mich App 687, 692; 282 NW2d 183 (1979), *rev'd other grds* 407 Mich 817 (1979).

In the case at bar, clearly a delivery of cocaine took place with knowledge of its unlawful purpose. What must be determined here is whether there is sufficient evidence to link the defendant to that transaction as an aider and abettor.

The mere presence of the accused during the criminal activity is insufficient to convict him. *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983). However, aid, advice, or encouragement, however minimal, is sufficient to find a defendant guilty as an aider and abettor. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

The court must analyze what the defendant said during the cocaine transaction. He told Good twice to try one

of the other bags and to compare the quality. A reasonable person could infer that those statements were made to encourage the sale of the cocaine. Then, after the sale was completed, the defendant explained how to cut the cocaine. The defendant then proceeded to snort some of the cocaine. While this cannot be said to have encouraged the sale, it can be said that this was to reassure Good of the high quality of cocaine he had just purchased. These statements and actions of the defendant were sufficient to justify a reasonable trier of fact in finding that the defendant aided and abetted the delivery of a mixture containing cocaine. See *People v Harper,* 39 Mich App 134, 142; 197 NW2d 338 (1972).

III. Did the court abuse its discretion in sentencing the defendant to prison for 5 to 20 years?

The statute the defendant violated, delivery of a mixture containing cocaine in an amount of 50 grams or more but less than 225 grams, states that a person convicted of this offense is guilty of a felony and *shall* be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). MCL 769.9(3); MSA 28.1081(3) provides:

> "(3) In cases involving a major controlled substance offense for which the court is directed by law to impose a sentence which cannot be less than a specified term of years nor more than a specified term of years, the court in imposing the sentence shall fix the length of both the minimum and maximum sentence within those specified limits, in terms of years or fraction thereof, and the sentence so imposed shall be considered an indeterminate sentence."

The Legislature has the exclusive authority to determine the appropriate length of imprisonment for a felony and the court, in imposing a sentence, has only limited discretion to act within the parameters set forth in the statute. *People v Coles*, 417 Mich 523, 538; 339 NW2d 440 (1983); *In re Callahan*, 348 Mich 77, 80; 81 NW2d 669 (1957). Under MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), the court must sentence a defendant to a minimum of 10 years or to life-time probation. *Cf. People v Campbell*, 115 Mich App 369, 376; 320 NW2d 381 (1982), *lv den* 412 Mich 928 (1982). If defendant is not placed on probation for life, MCL 769.9; MSA 28.1081(3) requires a minimum sentence of 10 years imprisonment.

Defendant's conviction is affirmed and pursuant to MCR 7.216(A)(2)(7) this case is remanded for resentencing consistent with MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Glenn S. Allen, Jr.
/s/ Edward M. Thomas

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 11th day of June in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

Donald E. Holbrook, Jr.

Presiding Judge

Glenn S. Allen
Edward M. Thomas

Judges

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT GRZEGORCZYK,

Defendant-Appellant.

No. 71995
L.C. No.
82-31574-FY

In this cause a motion for rehearing is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN – ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 13th day of June in the year of our Lord one thousand nine hundred and eighty-six

/s/ Ronald L. Dzierbicki
Chief Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 3rd day of December in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
G. MENNEN WILLIAMS
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

78978

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT A. GRZEGORCZYK,

Defendant-Appellant.

SC : 78978
COA: 71995
LC : 82-31574-FY

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

11/25

STATE OF MICHIGAN – ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of December in the year of our Lord one thousand nine hundred and eighty six.

(seal)

/s/ Corbin R. Davis Clerk.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 4th day of March in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable DOROTHY COMSTOCK RILEY, Chief Justice

CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DENNIS W. ARCHER, ROBERT P. GRIFFIN, Associate Justices

78978 (63)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT A. GRZEGORCZYK,

Defendant-Appellant.

SC : 78978
COA: 71995
LC : 82-31574-FY

On order of the Court, the motion *in propria persona* for reconsideration of this Court's order of December 3, 1986, is considered, and it is DENIED, without prejudice to the defendant raising the claims, among others, of

double jeopardy and due process violations to a "resentence" of the defendant after being discharged by the Department of Corrections.

Levin, J., would remand to the Court of Appeals for the appointment by the trial court of counsel for the defendant, if indigent; and for reconsideration, after briefing, whether the Court of Appeals had jurisdiction to grant affirmative relief to the People increasing the defendant's sentence absent the filing by the People of a cross-appeal and of other issues the defendant's counsel may raise.

STATE OF MICHIGAN – ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 4th day of March in the year of our Lord one thousand nine hundred and eighty-seven.

(seal)

/s/ Corbin R. Davis Clerk.

PEOPLE v GREGORCZYK (sic)

Docket No. 101050. Submitted March 1, 1988, at Lansing. Decided July 5, 1989. Leave to appeal applied for.

Robert A. Gregorczyk was convicted in 1983 of delivery of more than 50 grams but less than 225 grams of cocaine following a bench trial in Genesee Circuit Court, Harry A. McAra, J. Despite the fact that the statute at that time provided that one convicted of that crime was to be sentenced to either life probation or a prison term with a minimum term of at least ten years and a maximum sentence of twenty years, Judge McAra sentenced defendant to a prison term of from five to twenty years. Defendant appealed. The Court of Appeals affirmed the conviction but remanded for resentencing in accordance with statutory mandate. Unpublished opinion per curiam of the Court of Appeals, decided March 25, 1986 (Docket No. 71995). Following a denial of his motion for rehearing, defendant sought leave to appeal to the Supreme Court. During the pendency of the application for leave to appeal, the parole board, in October, 1986, granted defendant an early discharge from his sentence. The Supreme Court denied leave to appeal and subsequently denied defendant's motion for reconsideration without prejudice to defendant's raising in the trial court claims relating to his resentencing. 426 Mich 881 (1986). The successor trial court, Valdemar L. Washington, J., sentenced defendant to life probation. Defendant appealed.

The Court of Appeals *held:*

1. The record contains no evidence that the sentence of the judge on resentencing was the product of vindictiveness or retaliation because defendant had appealed his conviction and sentence.

2. Lifetime probation does not constitute cruel or unusual punishment.

3. Since under the new sentence of life probation it would be impossible for defendant to receive credit for the time he had already served, the new sentence of life probation constitutes a new and separate sentence for the same crime and thus is violative of the constitutional prohibition against multiple punishments for the same crime.

4. A statutorily valid sentence of from ten to twenty years would also have been constitutionally invalid under these circumstances where the parole board has granted defendant an absolute release from the original invalid sentence even though such release was in violation of the statutory provision prohibiting parole of one convicted of this crime until that person had served the minimum sentence imposed by the sentencing court.

Sentence is vacated and defendant is discharged.

SAWYER, P.J., dissented. He would hold that imposing a valid sentence in place of a prior invalid sentence does not constitute double jeopardy and that the unlawful action of the parole board could not affect the ability of the court to impose a statutorily valid sentence. He would affirm.

Frank J. Kelley, Attorney General, *Louis J. Caruso*, Solicitor General, *Robert E. Weiss*, Prosecuting Attorney, *Donald A. Kuebler*, Chief, Appellate Division, and *Mark Sanford*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *P. E. Bennett*), for defendant.

Before: SAWYER, P.J., and MICHAEL J. KELLY and J.J. RASHID,* JJ.

J.J. RASHID, J. This is a case of first impression in Michigan by virtue of the unique factual situation it presents. On January 23, 1983, defendant was convicted of delivery of more than 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). At the time, the statute required that defendant be either imprisoned for not less than ten years nor more than twenty years or placed on probation for life.[1]

On May 25, 1983, defendant was sentenced to prison for a term of from five to twenty years. Defendant then appealed his conviction and sentence, claiming in part that this sentence was too severe. In an unpublished per curiam opinion, this Court affirmed defendant's conviction but remanded for resentencing consistent with MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) stating: "If defendant is not placed on probation for life, MCL 769.9(3); MSA 28.1081(3) requires a minimum sentence of ten years imprisonment." Defendant's petition for rehearing in this Court and application for leave to appeal to our Supreme Court were denied.

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*Circuit judge, sitting on the Court of Appeals by assignment.

[1] The statute has since been amended and now calls for a minimum of five years and a maximum of twenty years or life probation.

On October 24, 1986, while defendant's application for leave to appeal to the Supreme Court was pending, the Parole Board granted defendant an early discharge from this original sentence. On March 4, 1987, the Supreme Court denied defendant's motion for reconsideration, "without prejudice to the defendant's raising the claims, among others of double jeopardy and due process violations to a 'resentence' of the defendant after being discharged by the Department of Corrections."

On March 5, 1987, defendant was sentenced by a successor circuit court judge to probation for life. Defendant now appeals as of right from his resentencing.

The first claim by defendant is that the trial court lacked jurisdiction to resentence him. The first sentence imposed on the defendant was invalid because the minimum prison term of five years was obviously less than the statutorily prescribed minimum of ten years. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). It is well-established that an invalid sentence may be set aside and a valid one imposed, subject to the defendant's right to receive credit for any time served on the invalid sentence. *People v Wilson*, 111 Mich App 770; 315 NW2d 423 (1981). The trial court had jurisdiction to resentence defendant.

Defendant also claims that his resentencing was a violation of due process because it improperly punished him for having appealed his original conviction and sentence. There is nothing in the record below which supports defendant's claim in this regard. To the contrary, the trial judge was sympathetic to defendant's predicament, calling it "an unfortunate case," and noting the mandatory sentencing provisions of the statute, as well as

defendant's exemplary record. The court was faced with two sentencing choices under the statute: life probation or a prison term of from ten to twenty years. It is certainly arguable that life probation is the less severe of the two available options. In short, there is no evidence that the trial court's second sentence was based on vindictiveness or retaliation. See *North Carolina v Pearce,* 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

We also reject defendant's argument that lifetime probation constitutes cruel and unusual punishment. See *People v Campbell,* 115 Mich App 369; 320 NW2d 381 (1982), lv den 417 Mich 879 (1983); *People v Tanksley,* 103 Mich App 268; 303 NW2d 200 (1981).

The defendant's claims regarding double jeopardy and other due process violations require a more detailed analysis of the facts and legal issues involved. It should be emphasized that the fact distinguishing this case from others reported is that, at the time of his resentencing, defendant had already received a discharge from his original sentence by the parole board.

Defendant relies on *North Carolina v Pearce, supra,* to support his double jeopardy claim. A review of that case reveals that the facts are distinguishable from those presented here and that the primary legal issues concerned a defendant's right to appeal without the fear of being punished for doing so. This aspect of *Pearce, supra,* was further clarified in *Wasman v United States,* 468 US 559; 104 S Ct 3217; 82 L Ed 2d 424 (1984). However, some basic legal principles set forth in *Pearce, supra,* have application here. The United States Supreme Court held that the Fifth

Amendment guarantee against double jeopardy, enforceable against the states through the Fourteenth Amendment, "protects against multiple punishment for the same offense." *Pearce, supra,* p 717. Quoting from *Ex parte Lange,* 85 US (18 Wall) 163, 168, 173; 21 L Ed 872 (1874), the Court went on to say:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts for the same statutory offense.
>
> " . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." [Citation omitted.]
>
> We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully "credited" in imposing sentence upon a new conviction for the same offense. The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. Suppose, for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years' imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a 10 year sentence, then, quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of three years and 10 years, although the maximum single punishment for the offense is 10 years' imprisonment. *Though not so dramatically evident, the same principle obviously*

holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.

> We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully, "credited" in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. but if he is reconvicted, those years can and must be returned – by subtracting them from whatever new sentence is imposed. [395 US 717-719, emphasis added.]

This principle was followed by our Supreme Court in *People v Sturdivant*, 412 Mich 92, 96, 97; 312 NW2d 622 (1981). In that case, the defendant was initially placed on probation with a condition that the first six months be served in jail. After finding that defendant violated his probation, he was sentenced to a prison term without receiving credit for the six months served as part of his probation. Citing the last two paragraphs of the above-quoted section of *Pearce, supra*, the Supreme Court said:

> We can discern no basis for refusing to apply this principle to the situation before us, in which the initial period of incarceration was a condition of probation rather than a sentence voided by reversal. To hold otherwise could lead to the anomalous result of a defendant suffering longer incarceration as a result of having been placed on probation than if initially sentenced to the maximum prison term possible for the offense. [412 Mich 97.]

Pearce, supra, applied the protection against multiple punishment to sentencing after reconviction. *Sturdivant, supra*, applied the same principle to probation violators

who served time as a condition of probation. We see no reason not to apply the principle here, where defendant is compelled to serve two separate and distinct sentences for the same offense. This is true even though the first sentence did not conform to the statute. The nonconformance does not change the fact that defendant served 3½ years of the 5- to 20-year term initially imposed, and was fully discharged from that sentence.

The situation here is analogous to the hypothetical posed in the above-quoted section of *Pearce, supra,* pp 718-719. Even though the sentence was not occasioned by a reconviction or a probation violation, defendant is still compelled to serve two separate and distinct sentences. He has served 3½ years of this 5- to 20-year term and has been discharged from that sentence. He must now undergo the additional punishment of lifetime probation along with the supervision, conditions and restrictions which accompany that sentence. Although probation, even for life, may be considered less severe than imprisonment, and is generally viewed more as rehabilitative than punitive, it is still a sentence or punishment imposed by the court for violation of the law. The conditions and restrictions attached to probation represent a form of punishment. In addition, a violation of probation could result in a prison term. It is true that, in some situations, a jail or prison term can be a condition of probation. However, in this case, the prison term and probation for life are separate and distinct sentences. The defendant cannot be compelled to serve both as that would result in multiple punishment for the same offense contrary to the Fifth Amendment protection against double jeopardy. *Pearce, supra.*

Under *Pearce*, the constitutional protection against multiple punishments for the same offense "is violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense." The case at bar does not involve a new conviction. However, *Sturdivant, supra*, went beyond new convictions and applied the same principles to probation violations. Further, the *Pearce* Court also held, "the same principle obviously holds true *whenever* punishment already endured is not fully subtracted from *any new sentence imposed.*" *Pearce, supra*, p 718. (emphasis added). On the narrow facts of this case, it is reasonable to apply the principle that the constitutional protection against multiple punishments for the same offense is violated when punishment already exacted is not fully credited in resentencing.

It is quite clear that there is no way to subtract the years served in prison from the term of life probation imposed. Defendant, in effect, received no credit for the 3½-year prison term he served. Admittedly, he cannot receive such credit toward the term of life probation. The only way to receive the credit would be to impose the mandatory ten-to twenty-year prison term, which we believe would be much less desirable to defendant than lifetime probation. It is apparent that the trial judge shared this belief when he imposed the less severe probationary term. But we must address the facts before us. Those facts indicate that defendant received life probation without any credit for the prison term he served. For the reasons stated, that amounts to multiple punishment for the same offense, contrary to the Fifth Amendment guarantee against double jeopardy.

We recognize it can be argued that application of our reasoning could result in a different conclusion if defendant had been resentenced to ten to twenty years, receiving credit for the time served. However, this would not change the result since any resentencing of defendant after his discharge from his first sentence would result in a denial of due process.

Defendant was discharged from his original sentence by the parole board, by an order entitled, "Parole Board Order for Discharge from Sentence." It is apparent that Gregorczyk's release and discharge was contrary to MCL 333.7401(3); MSA 14.15(7401)(3). Under that section, a person is not eligible for parole until he has served at least the minimum term imposed by the sentencing court. The mandatory minimum in this case is ten years.

The Department of Corrections must be charged with notice of these facts, presumably having access to the defendant's history and file, knowledge of the crime charged and the order imposing sentence. The department must also be charged with knowledge of applicable statutory provisions.

Defendant's release and discharge from parole was an act carried out by the executive branch of state government through the Department of Corrections' Parole Board. His discharge was therefore an exercise of executive powers. The Department of Corrections is required to exercise its discretion to grant paroles or discharges within certain statutory limits. See MCL 791.231 *et seq.*; MSA 28.2301 *et seq.* In light of all of this, it is a source of confusion, to say the least, as to why the department released the defendant and discharged him from parole

prior to serving even the minimum five years imposed by the trial court.

This Court will not assume that the Department of Corrections acts in an arbitrary fashion. In the absence of facts to the contrary, it is presumed that it satisfied itself that defendant was an appropriate candidate for discharge from parole and was not a threat to the health and safety of the public. There are no claims of fraud, misrepresentation of documents or other irregularities in the process of defendant's discharge, other than the glaring fact that defendant should not have been released prior to serving a minimum of ten years under the statute.

In fact, the record before us does not reveal any of the facts and circumstances surrounding the defendant's discharge, other than the fact of the discharge itself. It appears Gregorczyk was released without any further supervision, conditions or obligation on his part. The record reveals no corrective action taken by the Department of Corrections at any time. The discharge may have been the result of an honest oversight, negligence, economic considerations, overcrowded prisons or more. A determination of that question would be purely speculative given the absence of any supportive facts.

Given this scenario, we must determine the effect of defendant's discharge by the Department of Corrections. Only one reported Michigan case can be found which addressed the definition or effect of an absolute discharge. In *In re Eddinger,* 236 Mich 668, 670; 211 NW 54 (1926), which concerned the Governor's authority to recall or revoke an absolute discharge issued after expiration of the prisoner's parole period, the Court said:

> "The purpose of a parole is to keep a prisoner in legal custody while permitting him to live beyond the prison enclosure so that he may have an opportunity to show that he can refrain from committing crime. It is a conditional release. The condition being that if he makes good he will receive an absolute discharge from the balance of his sentence; but if he does not make good he will be returned to serve his unexpired term. The absolute discharge is something more than a release from parole. It is a remission of the remaining portion of the sentence. Like a pardon, it is a gift from the executive, and like any other gift it does not become effective until it is delivered and accepted. After delivery it cannot be recalled. So in the instant case if there was a delivery and acceptance of the discharge, it was beyond the power of the governor to revoke it."

In the absence of any facts to the contrary, it appears that defendant received an absolute discharge from the balance of his first sentence on October 24, 1986. This discharge must operate as "a remission of the remaining portion of his sentence," as in *Eddinger, supra*. To impose a new sentence on defendant after being discharged from the first sentence would amount to a revocation or recalling of that discharge. It is axiomatic that the due process guarantee applies with respect to matters relating to sentence and punishment. In this case with the imposition of the second sentence, defendant's absolute discharge has been summarily revoked without due process.

It has also been held that "[t]he test for denial of due process depends in each case upon the facts thereof." *In re Meissner*, 358 Mich 696, 698; 101 NW2d 243 (1960). In this case, due process would require, at a minimum, an

inquiry into the facts, circumstances and reasoning surrounding defendant's discharge. There is nothing presented in the record before us sufficient to warrant a recall or revocation of defendant's discharge.

Since the discharge operates as "a remission of the remaining portion of his sentence," *Eddinger, supra,* his obligation to the state has ended. On these limited facts, defendant cannot be compelled to serve an additional sentence.

The order of sentence imposing life probation on defendant is reversed. Defendant is discharged from the term of life probation.

MICHAEL J. KELLY, J., concurred.

SAWYER, P.J. *(dissenting).* I respectfully dissent.

Defendant argues that the trial court was without jurisdiction to resentence him. I disagree.

Once a trial court has imposed a valid sentence, that sentence may not be set aside and a new sentence imposed. *People v Whalen,* 412 Mich 166, 169; 312 NW2d 638 (1981). However, an invalid sentence may be set aside and a valid one imposed, subject to the defendant's right to receive credit for any time served on the invalid sentence. *People v Dorsey,* 107 Mich App 789, 792; 310 NW2d 244 (1981). However, a trial court's authority to resentence depends on the invalidity of the original sentence.

In the instant case, defendant's first sentence was invalid because it fell outside the statutory limitation on the sentencing judge's discretion. The exclusive authority for determining the appropriate length of sentence for each crime is vested in the Legislature. *People v Coles,* 417

Mich 523, 538; 339 NW2d 440 (1983); *In re Callahan*, 348 Mich 77, 80; 81 NW2d 669 (1957). A sentencing court's discretion in imposing a particular sentence is therefore limited to acting within the parameters expressed in the statute. *Coles, supra* at 540, citing *Whalen, supra*.

At the time of defendant's sentencing, the only authorized sentences for a defendant convicted of delivery of more than 50 grams but less than 225 grams of cocaine were a prison term of at least 10 years in length, but less than 20 years, or probation for defendant's lifetime. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). The Legislature further limited the possibility of altering a defendant's sentence under the statute by precluding defendant's eligibility for parole or suspension of his sentence before the expiration of the mandatory term. MCL 333.7401(3); MSA 14.15(7401)(3). Moreover, should a defendant receive the alternative, life probation, such probation may be terminated only by revocation and imposition of the minimum prison term. MCL 771.2(3); MSA 28.1132.[1]

Because defendant's original sentence did not conform to the statutory mandate, that sentence was invalid. The trial court thus had jurisdiction to impose the instant sentence as defendant's first valid sentence.

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[1] The 1987 amendment to MCL 333.7401(3); MSA 14.15(7401)(3), which is inapplicable here, has altered the sentencing options for a conviction under that provision. The amended statute precludes granting disciplinary credits or "any other type of sentence credit reduction," but also lowers the minimum authorized prison sentence to five years. 1987 PA 275.

Defendant next contends that, because he was discharged from the original sentence before being resentenced, the new sentence violates defendant's right to protection from double jeopardy. US Const, Ams V, XIV; Const 1963, art 1, § 15. However, substituting a valid sentence for an invalid sentence does not constitute double jeopardy, even if the invalid sentence has been served. *Bozza v United States*, 330 US 160; 67 S Ct 645; 91 L Ed 818 (1947); *In re Pardee*, 327 Mich 13, 18; 41 NW2d 463 (1950); *People v Corlin*, 95 Mich App 740; 291 NW2d 188 (1980). Moreover, pursuant to MCL 333.7401(3); MSA 14.15(7401)(3), defendant was not eligible for parole and was not properly subjected to the jurisdiction of the parole board before serving the minimum sentence imposed. Defendant may not base his claim of double jeopardy on the apparently unlawful actions of the parole board concerning defendant's invalid sentence.

Defendant next argues that the trial court violated his right to due process because it punished him for appealing his conviction by imposing a term of life probation. Assuming, without deciding, that defendant received a harsher sentence, his argument is still without merit.

In a case where the original sentence is invalid, a defendant may not use his original sentence as a guideline for attacking the current, valid sentence. *People v Gauntlett*, 152 Mich App 397, 401-402; 394 NW2d 437 (1986). Additionally, we find no evidence in the record to support a claim that the resentencing court intended to punish defendant for exercising his right to appeal. The resentencing court's comments reflect an appreciation for, and approval of, defendant's exemplary behavior. The court expressed its belief that this was an "unfortunate

case." However, because of the original error, and defendant's exercising his right to appeal, he has actually spent less time incarcerated for this offense than if a valid prison sentence had originally been imposed.

Defendant next asserts that his resentencing violates the doctrine of separation of powers, because it interferes with the Governor's power to grant commutations, reprieves or pardons. Const 1963, art 5, § 14.

We do not have before us the parole board's file on defendant. However, it appears that defendant received an early release from his sentence in the form of a discharge from parole. The certificate of discharge does not reflect the Governor's pardon or reprieve. Even if this early discharge were considered to be a commutation by the Governor, I do not believe defendant's resentencing violates the doctrine of separation of powers. This is so because defendant's original sentence was invalid. The constitutional power granted the Governor to commute a defendant's sentence presumes imposition of a valid sentence.

Defendant next argues that life probation constitutes cruel and unusual punishment contrary to federal and state constitutional protections. I agree with other panels of this Court which have held that life probation does not constitute cruel or unusual punishment. See *People v Campbell*, 115 Mich App 369; 320 NW2d 381 (1982); *People v Tanksley*, 103 Mich App 268; 303 NW2d 200 (1981).

Further, defendant's claim that a sentence to life probation violates the principles of due process and equal protection is without merit. I am not persuaded that no

rational relationship exists between a legitimate state interest and the distinction made between crimes for purposes of establishing the permissible length of a probationary term. See *People v Kaigler,* 116 Mich App 567, 570; 323 NW2d 486 (1982).

The legislative scheme regarding punishment for drug offenses evinces a recognition that sale and use of illicit drugs is an extremely serious threat to the well-being of the people of this state. With the increasing number of drug-related offenses, the apparent high profit in dealing drugs and the difficulties encountered in enforcing the drug laws, I cannot say that no rational basis exists for differentiating between drug offenses and other offenses for purposes of punishment.

I would affirm.

Michigan Supreme Court
Lansing, Michigan

Order

Dorothy Comstock Riley
Chief Justice

Entered: November 22, 1989

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

86708 & (25)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT ALAN GRZEGORCZYK,

Defendant-Appellee.

SC : 86708
COA: 101050
LC : 82-031574-FY

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is therefore moot and is DENIED.

Riley, C.J., Boyle and Griffin, JJ., would grant leave to appeal.

61116
(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

November 22, 1989 /s/ Corbin R. Davis
Clerk

Michigan Supreme Court
Lansing, Michigan

Order

Dorothy Comstock Riley
Chief Justice

Entered: January 29, 1990

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

86708(30)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT ALAN GRZEGORCZYK,

Defendant-Appellee.

SC : 86708
COA: 101050
LC : 82-031574-FY

On order of the Court, the motion for reconsideration of this Court's order of November 22, 1989, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

50/23

(SEAL) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1990 /s/ Josephine B. Mac Kinnon
Deputy Clerk
